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ABSTRACT

Most employees in the United States are employees at will--they can be fired for any or no reason. In one exception to this rule, however, federal or state statutes protect employee expression, most significantly in the area of private employee testimony. The protective schemes developed by Congress and the state legislatures are of two types: those designed to protect employees testifying before courts, labor commissions, or legislatures and those designed to protect employees testifying about specific statutes concerning air pollution, wages and hours, coal mine health and safety, and so forth. Another major category of statutes protecting employee communication are those that protect political activities such as expressing political opinion, supporting a particular party or candidates, and running for and serving in political office. Thus far, legislative protection seems to be more common either when the communication is far removed from the job or when a narrow, tightly developed statute exists to avert some grave danger. Even in the present fragmented statutory approach, legislation protecting employee communication has been passed during the past decade at a rate far greater than at any other time in history. Legislatures face the basic question of whether or not organizations can operate efficiently if their employees are free to communicate. (HOD)

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# CURBING THE EMPLOYER'S POWER TO SUPPRESS COMMUNICATION: A REVIEW OF STATE AND FEDERAL STATUTES PROTECTING THE COMMUNICATION OF PRIVATE SECTOR AT WILL EMPLOYEES

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# I. Introduction

In the United States, the First Amendment guards against suppression of free speech by government. However, the broad guarantees of the First Amendment do not proscribe private employers from limiting their employees' speech via threat of dismissal, transfer, or other discrimination.

Most employees in the United States are employees at will. They can be fired for a good reason, a bad reason, or no reason at all.[1] There three broad exceptions to the rule. First, employees with a contract for a fixed term generally can be fired only for cause. This provides some protection for expressive behavior, especially where it occurs off the job and is not job related. Second, in the last decade, a minority of states have recognized common law exceptions to the at will rule based on breach of contract and tort theories. However, these remedies usually only apply where an employee is forced to break the law, foresake a statutory right, or abandon a statutory duty. In other words, these actions are usually limited to situations involving statutorily defined public policy. The final exception, and the topic of this essay, is where Congress or the state legislatures protect employee expression via specific statutes.

## The Power to Regulate by Statute

At one time, attempts by Congress and the state legislatures to limit employers' freedom in the use of the

at will rule was held to be unconstitutional. In 1908 the United States Supreme Court struck down a federal statute that barred the discharge of railroad employees on the ground of union membership.[2] The Court held that the statute violated liberty of contract and property rights guaranteed by the Fifth Amendment. A few years later the Supreme Court struck down a similar Kansas statute.[3]

However, this position crumbled in the spirit of Roosevelt's New Deal. In the 1937 case NLRB v. Jones & Laughlin Steel Corporation, the Supreme Court upheld the power of Congress to protect union activity through the National Labor Relations Board.[4] Today, statutory regulation of employment is pervasive and designed to foster a wide range of legislative agenda.

Developing a Statutory Taxonomy

The sections of statutes protecting the communicative acts of private employees are found scattered throughout the codifications of both federal and state statutory law. The relevant sections are often little more than single paragraphs buried in much larger statutory bodies. To make matters more difficult, the indices in many of the codes, including USCA, do not clearly and consistently guide the researcher to the relevant sections. Therefore, a search was made for federal statutes by going chapter by chapter through West's United States Code Annotated. A search for state statutes was made using Commerce Clearing House's Labor Law Reporter.

Using such research methods, two problems develop. First, it is possible that a few sections might be overlooked. Secondly, and more importantly, putting these provisions into a taxonomy of free communication protections pulls the sections away from their codification and portrays them in a manner which is foreign to the way that they are actually used. This might create the illusion of a systematic plan to protect employee communication which does not in fact exist. With these dangers in mind, a taxonomy was developed.

Federal and state statutes protecting private sector employee communication fall into two broad categories. The first contains statutes which protect the employee's right to testify or make complaints. This category can be broken down into two subcategories. The first subcategory contains broad protections not anchored to a specific statutory purpose. The second contains protections designed to apply only to some specific statutory purpose such as coal mine health and safety.

The second major category contains protections for political activities. Here again, two subcategories emerge. The first involves protection of one's political opinion or support for a particular party or candidate. The second subcategory involves protection of employees who actually engage in politics by running for and serving in public office.

It should be noted that laws pertaining to union

activity have been excluded. This was done in order to limit the monograph to the problems of employees who do not enjoy a contract for a fixed term. However, it should be remembered that much legislation concerning union organizing has been passed on both the state and federal level.

## II. Statutes Protecting Testimony

Apart from the special case of union organizing, the most significant area of legislative protection of private employee communication surrounds testimony. In drafting these statutes, the legislatures recognize the risk that employers might suppress the expression of their employees by exercising their freedom to hire and fire at will. The protective schemes developed by Congress and the state legislatures are of two types. The first type contains broad protections designed to protect employees when they testify before courts, labor commissions, or legislatures. The second type is designed to protect employees when they testify about specific statutes concerning air pollution, wages and hours, coal mine health and safety and so forth. These provisions protect employees only when they testify about the concerns expressed in specific statutes.

### General Protections

The general protections of employee testimony are

limited to only a few states; California and Connecticut having the most comprehensive. Almost all are limited to specific purposes such as judicial proceedings, labor investigations, and legislative investigations.

The most frequent provision involves testimony in court. California,[5] Hawaii,[6] Kentucky,[7] and New York,[8] prohibit dismissal for being a witness in any judicial proceeding while Connecticut,[9] and Illinois[10] limit protection to criminal actions. These statutes vary considerably in their enforcement mechanisms. In California violation is a misdemeanor and the employee is entitled to reinstatement with all back wages and benefits. In Connecticut the employer is fined $500 and might serve 30 days in jail. In addition, the employee, within 90 days, may file a civil action. Hawaii also treats violation as a petty misdemeanor and the employee may, within 90 days, file a civil action for reinstatement and up to a maximum of six weeks back wages. Kentucky requires the employer to reemploy the employee, pay costs and all back wages. Illinois and New York take a different approach and hold the employer in contempt of court.

The second most common general testimony protection involves testimony in labor investigations and proceedings. California[11] and New York[12] protect testimony before their respective commissioners of labor while Kansas[13] protects complaints and testimony before its Secretary of Human Resources. Louisiana protects testimony in any investigation

of state labor laws.[14] Enforcement provisions are similar. In California violation is a misdemeanor. However, California's law does not apply if the employee willfully misrepresents facts to support a complaint or claim.[15] A violation in Kansas can result in up to a $1000 fine and up to one year in prison. In Louisiana the employer is subject to a fine of not less than $100 and not more than $250 and not less than 30 and not more than 90 days in jail. In New York a violation is a misdemeanor with a fine of not less than $50 or more than $500.

Two states protect employees who testify before their legislatures. California makes it illegal to coerce a witness to appear or not appear before the legislature or one of its committees.[16] Oregon prohibits employers from discriminating against employees solely for the reason that the employee testified before the Oregon Legislature or any of its committees.[17] In California the offense is a misdemeanor. In Oregon the employee either enters a complaint and attempts conciliation through the Commissioner of Labor or files a civil suit and seeks reinstatement and compensatory damages.

The most expansive of the general testimony provisions is found in a recent Connecticut statute. It provides that:

> No employer shall discharge, discipline or otherwise penalize any employee because the employee, or a person acting on behalf of the employee, reports, verbally or in writing, a violation or suspected violation of any state or federal law or regulation

> or any municipal ordinance or regulation to a public body, or because an employee is requested by a public body to participate in an investigation, hearing or inquiry held by that public body, or a court action. The provisions of this subsection shall not be applicable when the employee knows that such report is false.[18]

After exhausting all administrative remedies, the employee may, within 90 days, bring civil action for reinstatement and payment of all back wages and benefits.

Protection Associated with Specific Legislation

The second type of testimony protection is found in provisions embedded in specific legislation. Although these protections are much more narrowly drawn than the general provisions previously discussed, they are widely used in state and federal statutes. Most of these provisions can be classified as being associated with labor standards (wage and hours etc.), safety, and enviornmental protection statutes.

Several states and the federal government have statutory provisions to protect employee testimony about fair labor standards. Oregon,[19] Pennsylvania,[20] and Utah[21] prohibit discrimination against employees who testify in minimum wage actions. Minnesota,[22] Washington,[23] and Wisconsin[24] protect testimony on wages and hours of females and minors while

Nevada[25] and Oregon[26] also protect testimony on female and minor working conditions. Violation of these provisions are all considered misdomeanors.

On the federal level, several labor standards statutes have provisions to protect employee testimony. The Fair Labor Standards Act which dates back to 1938 and covers, among other things, wages and hours, prohibits discrimination or discharge against ". . . any employee because such employee has filed any complaint or instituted or caused to be instituted any proceeding under or related to this chapter or has testified or is about to testify in any such proceeding, or has served or is about to serve on an industrial committee."[27] The penalty includes a fine up to $10,000 or imprisonment up to 6 months. In addition, the employee may sue for reinstatement, back wages, and other compensatory damages.

Retirement testimony is also offered protection. "It shall be unlawful for any person to discharge, fine, suspend, expel, or discriminate against any person because he has given information or has testified or is about to testify in any inquiry or proceeding relating to this act or the Welfare and Pension Plans Disclosure Act,"[28] The employee may sue for relief in equity. The employer is subject to up to a $5000 individual and $100,000 corporate fine and/or imprisonment up to one year for ignoring the court order.

A special provision for a specific industry is found in the Longshoremen's and Harbor Workers' Compensation Act.[29]

The Act prohibits employers or their agents from discharging or discriminating against employees who claim compensation or testify or are about to testify in a proceeding under the Act. Violations of the provision are punished by a fine of from $100 to $1000. The employee must be restored to employment, if able, with back pay.

Perhaps the best known protection of testimony is found in the 1964 Civil Rights Act and its 1972 Amendments. It provides that:

> It shall be an unlawful employment practice for an employer to discriminate against any of his employees or applicants for employment, for an employment agency, or joint labor-management committee controlling apprenticeship or other training or retraining, including on the job training programs, to discriminate against any member thereof or applicant for membership, because he has opposed any practice by this subchapter, or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter.[30]

The Equal Employment Opportunity Commission is empowered to bring action in court. The court may enjoin the employer from further unlawful practices and order affirmative action, which may include but is not limited to reinstatement, back pay, or other equitable relief.

The next set of testimony protections is found attached to statutes which protect worker and public safety. On the state level, California prohibits discharge or threats of discharge of employees for complaints or testimony before its Industrial Accident Commission.[31] Violation is considered a misdemeanor.

On the federal level, protective clauses are found in a wide variety of safety statutes. The Occupational Health and Safety Act prohibits discharge or discrimination against employees who have filed a complaint, instituted or caused to be instituted any proceeding, or have testified or are about to testify in any proceeding concerning the Act.[32] The employee must, within 30 days, file a complaint alledging discrimination with the Secretary of Labor. The Secretary investigates the matter and brings an action in a U.S. District Court. The court restrains the employer and can order ". . . all appropriate relief including rehiring or reinstatement of the employee to his former position with back pay."[33]

Other federal safety statutes are aimed at specific industries. The Coal Mine Health and Safety Act provides that,

> No person shall discharge or in any other way discriminate against or cause to be discharged or discriminated against any miner or any authorized representative that (A) has notified the Secretary or his authorized representative of any alledged violation or danger, (B) has filed, instituted, or

> caused to be filed or instituted any proceeding under this chapter, or (C) has testified or is about to testify in any proceeding resulting from the administration or enforcement of the provisions of this chapter.[34]

The employee must, within 30 days, ask the Secretary of Labor for a review. If, after investigation, the Secretary finds a violation, he or she orders affirmative action including but not limited to rehiring or reinstatement and back pay.

Railroad safety has been a longstanding concern of Congress. A 1939 provision concerning railroad accidents involving injury or death prohibits any contract, provision, or rule which prevent employees of any common carrier from voluntarily furnishing information on incidents surrounding the death of an employee,[35] It also prohibits dismissal or diciplining of employees for giving voluntary information. Violation is punished by a fine of not more than $1000 and/or imprisonment for not more than a year.

A 1980 provision provides broader protection by covering testimony concerning all federal railroad safety laws. It prohibits discharge or discrimination against any employee for filing a complaint or instituting or causing to be instituted any proceeding concerning railroad safety laws or testimony in any such proceeding.[36] If a violation is found, the Railroad Adjustment Board can award backpay and order reinstatement.

A similar set of industry specific provisions is found in laws relating to merchant shipping. The earliest, dating back to 1790, concerns complaints that a vessel is unseaworthy.[37] It provides that if the first and second officers or a majority of the crew complain to the master that the ship is unfit for sea, the master must, with the aide of a judge, have the vessel inspected. If the master doesn't respond to the complaints, he or she can be fined $500. The statute does not apply to fishing vessels, whaling vessels, or yachts.

A similar provision, dating back to 1872, concerns provisions and water on board a vessel.[38] It provides that any three of the crew may complain to a shipping commissioner or the chief officer of customs that the water or provisions are of bad quality, unfit for use, or are deficient in quantity. An investigation is conducted and the master is informed that he or she must obtain adequate provisions or be fined up to $100. A sister provision requires that the master allow any seamen wishing to make a complaint to go ashore in proper custody and officially lodge the complaint.[39] Once again, the master risks a fine; in this case up to $100. Still another statutory provision protects seamen, who make complaints about water, provisions, cruel treatment, or the seaworthiness of the ship, against discharge in a foreign port. It provides:

> . . . it shall be the duty of the consul or counsulor agent to institute a proper inquiry into the matter,

> and, upon his being satisfied of the truth and justice of such complaint, he shall require the master to pay such seamen one month's wages over and above the wages due at the time of discharge, provide him with adequate employement on board some other vessel, or provide him with a passage on board some other vessel bound to the port from which he originally shipped, or to the most convenient port of entry in the United States, or to a port agreed to by the seaman.[40]

A much more recent protection is found in a 1978 statute dealing with shipping containers. It prohibits discharge or discrimination against an employee or reporting the exsitence of an unsafe container.[41] The employee must report the discharge or discrimination to the Secretary of Labor who investigates the matter. The Secretary then may bring action in a U.S. District Court which has the power to restrain violators and order appropriate relief including rehiring and reinstatement of the employee to his or her former position with back pay.

While the protection of employees who complain about safety has been a feature of maritime statutes for some time, employees of the trucking industry received similar protections only this year. A 1983 statute provides that:

> No person shall discharge, discipline, or in any

> manner discriminate against any employee with repect to the employee's compensation, terms, conditions, or privileges of employment because such employee (or any person acting pursuant to a request of the employee) has filed any complaint or instituted or caused to be instituted any proceeding relating to a violation of a commercial motor vehicle safety rule, regulation, standard, or order, or has testified or is about to testify in any such proceeding.[42]

The employee must report the violation within 180 days to the Secretary of Labor who conducts an investigation. If a violation is found, the Secretary may order affirmative action to abate the violation; reinstatement of the employee to the former position with compensation, including back pay, terms, conditions, and privileges of employment; and compensatory damages. The order can be reviewed by a U.S. Court of Appeals but the order stands during the review process. It is interesting to note that this new statute places the duty of issuing orders on the Secretary of Labor without involving the Federal District Courts.

A third set of testimony protections is found attched to environmental statutes. On the state level, Louisiana protects environmental testimony by prohibiting retaliation against employees for good faith reporting or complaints about possible environmental violations.[43] Employees may take thier employers to court and, if successful, may recover triple damages and all costs in addition to all other civil and criminal remedies available under any other state, federal, or local law.

During the decade of the 1970s, many federal environmental laws were drafted in a manner designed to protect the testimony of employees.

The Toxic Stubstances Act prohibits discrimination against an employee for causing a proceeding, testimony, or planned testimony or participation in any proceeding relating to the statute.[44] In order to obtain relief an employee must, within 30 days, file a complaint with the Secretary of Labor. An investigation is held and the Secretary may issue an order to reinstate the employee to his or her former position with back pay and full benefits, compensatory damages, and where appropriate exemplary damages. An appeal is available for the employer in a United States Court of Appeals.

Federal water pollution control statutes have similar provisions. An employee who has caused a proceedng or has testified or is about to testify in a water pollution proceeding may not be fired or otherwise discriminated against.[45] The employee must file a complaint with the Secretary of Labor within 30 days of the violation. The Secretary investigates the matter and may order the employer to take affirmative action to abate the violation, reinstate the employee to his or her former position with compensation as well as unspecified remedies. Judicial review is available.

A statute concerning the safety of public water systems and regulation of underground injection by the states prohibits discharge or other discrimination against an employee who causes to be commenced a proceeding, testifies or is about to

to testify in a proceeding, or participates or assists in a proceeding or investigation under the statute. The employee must file a complaint 30 days after violation to the Secretary of Labor who conducts an investigation and if a violation is found shall order affirmative action to abate the violation, reinstatement with back pay and other compensation, compensatory damages and where appropriate exemplary damages. An appeal is available to all parties in a U.S. Court of Appeals.[46]

Protection for air pollution testimony is similar to the protections concerning water pollution testimony. Employers are prohibited from discharging or in other ways discriminating against employees who cause a proceeding, testify or plan to testify, or participate in or assist in any proceeding concerning the statute.[47] Here again the employee must file a complaint within 30 days with the Secretary of Labor who investigates the matter and shall issue an order to the employer to take affirmative action to abate the violation, reinstate the employee to his or her former position with back pay and benefits, and pay compensatory damages. Court of Appeal review is available. It is interesting to note that, unlike the safe drinking water statute, exemplary damages are not mentioned.

The only environmental testimony protection which is industry specific is found in a statute concerning surface mining control and reclamation. It provides that no employer shall discharge or discriminate against an employee for causing a proceeding, testifying, or planning to testify in

any proceeding concerning the statute.[48] Again, the employee must file a complaint with the Secretary of Labor within 30 days. An investigation is made and the Secretary may order affirmative action to abate the violation, and rehiring or reinstatement of the employee with compensation. Here again, no exemplary damages are mentioned. Judicial review of the order is available.

## III. Statutes Protecting Political Activities

The second major category of statutes protecting employee communication contains statutes which protect political activities. In this broad category are the subcategories containing statutes which protect political opinion and support for a particular party or candidate and statutes which protect actually running for and serving in political office.

Since these statutes were not drafted in the familiar framework of the First Amendment, the rationale for inclusion in the categories deserves mention. The two subcategories were selected because of the amount of communicative activity necessary to pursue the behavior. Other political activities and activities required of citizens have been excluded. For example, 30 states and Puerto Rico have statutory protection for employees who agree to serve on juries, 39 states have statutes which protect the voting rights of employees. Many

protect the employees from coercion. Most allow time off for voting; often with pay. These provisions were excluded.

Furthermore, the term political activities should be clarified. While a few states have protected broad ranges of activities, most define political activities as those activities involved in choosing a representative government (i.e. political parties, campaigns, and public office).

Political Opinion and General Political Activities

Many of the state legislatures apparently fear that employers will interfere with the political process of the state. The wide range of statutes protecting jury service, free elections, time off to vote, and so forth indicate a profound interest in keeping employers' coercion out of the political process. A number of states have drafted statutes which protect the political opinion and general political activities of employees. As mentioned before, these are generally directed with an eye to the election process.

Nine states including California,[49] Colorado,[50] Louisiana,[51] Missouri,[52] Nebraska,[53] Nevada,[54] New Mexico,[55] Ohio,[56] South Carolina,[57] and Puerto Rico[58] prohibit employer retaliation against the political activities of their employees. Minnesota[59] and Texas[60] require employers to allow their employees to attend political conventions. Arizona prohibits

employer retaliation against employees for signing any petition or initiative.[61] Michigan takes a different approach by prohibiting employers from keeping records on the political activities of their employees.[62]

The penalty in Arizona is up to 6 months in prison and a fine of up to $1000. California has up to a year in prison, individual fines up to $1000 and corporate fines up to $5000. In addition the employee may seek damages. Colorado offers up to a $2000 fine, up to a year in jail, and possible damages for the employee. In Louisiana violations are considered misdemeanors with individual fines of between $100 and $1000, corporate fines of $500 to $1000, and up to 6 months in jail. Michigan allows an employee to go to court and seek damages and punishes willful violations with a $200 fine. Violation of Minnesota's law is considered a misdemeanor. Missouri punishes violatiors with up to a year in jail and a fine up to $2500. Nebraska has a fine up to $100 and up to 30 days in jail. Nevada fines violators between $100 and $500. New Mexico has a fine of between $100 and $1000 and 6 months in jail. Ohio punishes violators with a fine between $500 and $1000. South Carolina provides a fine between $50 and $1000 and/or 3 months to a year in prison. Texas punishes violators with up to a $500 fine. Puerto Rico uses primarily civil remedies. Employees there are eligible for double damages and reinstatement to their former positions.

Running for and Holding Public Office

The second type of political protection offered on the state level, and the most frequent, contains statutory provisions which prohibit employers from discriminating against employees who run and/or serve in public office. Considering that most state legislators are not full time lawmakers and often hold other employement, it should not be suprising that 11 states offer such protections.

Colorado,[63] Louisiana,[64] Missouri,[65] Nevada,[66] New Mexico,[67] and Wyoming[69] prohibit employer retaliation against employees for becoming candidates for public office. Oklahoma specifically protects railroad employees who become candidates.[69] Connecticut,[70] Indiana,[71] Nevada,[72] and Oregon[73] protect employees serving in their state legislatures while Minnesota[74] protects any elected official who takes time off to attend public meetings.

Most states consider violations as misdemeanors, three states offer civil remedies and Oklahoma revokes an offending corporation's charter. A violation in Colorado is punished with a fine of up to $2000 and up to one year in prison. Louisiana has an individual fine of between $100 to $1000, a corporate fine of between $500 and $2000 and up to 6 months in jail. Minnesota treats a violation as a misdemeanor. Missouri punishes violators with a fine up to $2500 and up to a year in jail. Nevada has a fine of between $100 and $500. New Mexico

features a fine of between $100 and $1000 and up to 6 months in jail. Wyoming punishes violators with a fine up to $1000 and up to 6 months in jail. Among the states which use civil remedies, Connecticut allows employees to be reinstated with back wages, Indiana allows compensatory damages, and Oregon allows employees to sue for reinstatement.

## IV. Conclusions

During the last semicentenary, legislation on the state and federal level has taken a pervasive role in many aspects of the employment relationship. The intervention has been so pronounced that it is now difficult to imagine a work place without legislation covering wages, hours, safety, or equal employment opportunity. The legislatures have come to recognize that the goals of the private sector and the pressures to meet those goals are not necessarily congruent with the goals of society at large and the individual members of that society. In other words, the legislatures have become unwilling to tolerate the harsh treatment of employees fostered by unlimited employer freedom.

Although few would argue that we should go back to the laissez faire days of brutish sweatshops, unsafe factories, and armed Pinkerton Agents; there are serious questions as to how far the legislatures should penetrate the employment relationship. One such question involves free communication

of private sector employees. This essay attempts to describe the nature of this legislative intervention and raises the question as to how much of this communicative freedom is justified.

In terms of communicative freedom, there is no sweeping statutory protection analogous to First Amendment protection offered in society at large. Rather, statutes protecting the communication of employees are embedded in a bewildering variety of legislation and offer a confusing assortment of enforcement mechanisms. It is difficult and perhaps even misleading to attempt to describe these provisions in a comprehensive taxonomy. However, such an exercise leads to fresh insight concerning the free communication, or lack thereof, of at will emp' yees in the private sector.

Reasons for Legislative Intervention

In terms of protecting the communication of private sector employees it is clear that Congress and many state legislatures feel that some intervention in the at will employment relationship is justified in order to proscribe employer retaliation against the communication of employees. However, these interventions are far from sweeping if we use the First Amendment's protections against government retaliation as a benchmark. Two trends seem to apply to the scope of protection. The protection seems to be more common either when the communication is far removed from the job (e.g. political speech) or when there is a narrow, tightly developed,

statutory purpose to avert some grave danger (e.g. mine explosions, poisoned drinking water). Mild public harm caused by, for example, accounting irregularities seems to merit little statutory protection of employee communication even though these problems might be subject to extensive statutory regulation.

Although the true motives for each specific statute are beyond the scope of this essay, three broad purposes can be discerned from the review of statutes. First, it is apparent that one purpose of this body of free communication protection is to protect the functioning of the traditional American political institutions. The legislatures seem to fear that employer suppression might interfere with the functioning of the courts, the election process, and even the legislatures themselves. If communication is curtailed, these functions might be impaired. A second purpose is to allow employee disclosure where public health and safety are threatened. Perhaps the most dramatic examples are in the area of environmental quality. It is interesting to note, however, that disclosure of problems such as fraud, deceptive advertising, and accounting irregularities receives almost no protection. A final broad purpose is to protect the integrity of work related statutes. The legislatures seem to realize that statutes concerning wages and hours, safety, working conditions, and so forth, would have diminished effectiveness if employers are allowed to retaliate against employees who complain or file charges.

The Mechanics of Protection

The effectiveness of any statutue largely depends on the effectiveness of its enforcement mechanism. Three main types of mechanisms are used in the statutes reviewed. The first type is the use of criminal misdemeanor remedies, the second is the use of civil remedies, and the third is the use of administrative remedies.

The use of criminal misdemeanor penalties has two disadvantages from the employee's point of view. First, the minor penalties involved (often a small fine), might not deter an employer from getting rid of an employee seen as a trouble maker. Secondly, the employee may not retain his or her former job even if the employer is convited unless there an equity provision in the statute or the employee is lucky enough to live in one of the small minority of states which allow tort of wrongful discharge and/or breach of contract actions for employees fired in contravention of statutorily defined public policy.

The use of civil remedies also has a major disadvantage. Although this type of remedy allows the employee to sue the employer, the employee must meet the difficult burden of proving that the dismissal was the direct result of the employee engaging in statutorily protected communication. This remedy at least provides the possibility of relief for the individual employee.

The final type of relief involves administrative action. Many statutes, especially on the federal level, provide that

a complaint be investigated by an administrative agency and in most cases, the agency or a court approached by the agency can order specific relief to the employee fired or discriminated against in retaliation for protected communication. The advantages of this approach are that the administrative agency assumes much of the reponsibility for conducting an investigation and the employee can often get reinstated with back pay and other benefits.

In many cases the above mentioned remedies are found in some combination. In some cases, especially on the federal level, a process for appeals is available to any party unsatisfied with the administrative decision.

The Future of Legislative Intervention

Legislative intervention in the employment relationship is used to put restrictions on employers that are similar to the restrictions that the Constitution puts on governments. The most sweeping example has been in the area of racial equality where legislation is used to bring equal protection and due process to the private sector workplace.

So far, the legislatures have not attempted to make such an end run around Constitutional shortcomings in order to bring First Amendment type protections to the private sector workplace by way of legislation. Instead, the legislatures have been most cautious in protecting certain types of employee communication against employer retaliation.

Even in the present fragmented statutory approach, legislation protecting employee communication has been passed during the past decade at a rate far greater than at any other time in history. In addition, some states such as California and Connecticut have taken the first bold steps toward sweeping legislation to protect employees who speak out against what they feel is wrong.

Legislatures will, if they have not already, have to face the basic question of whether or not organizations can operate efficiently if their employees are free to communicate. The same question faces modern courts in the rapidly developing areas of common law wrongful discharge torts and breach of contract actions; and a similar question is faced in the rapidly developing area of First Amendment free speech rights for government employees. The legal answers to these questions may come relatively slowly, but may vastly alter the employment relationship as we know it.

## Notes

[1] This rule has come to be known as the at will rule. Recently, it has been the butt of frequent criticism. For eample see: Lawrence Blades, "Employment At Will vs. Individual Freedom: On Limiting the Abusive Exercise of Employer Power," Columbia Law Review, 67 (1967), 1403-35; Cornelius Peck, "Unjust Discharges from Employment: A Necessary Change in the Law," Ohio State L. J., 40 (1979), 1-49; Samuel Estreicher, "At-Will Employment and the Problem of Unjust Dismissal: The Appropriate Judicial Response," New York State B.J., 54 (1982) 146-9, 170-5; Clyde W. Summers, "Individual Protection Against Unjust Dismissal: Time for a Statute," Virginia L.R., 62 (1976), 481-532; Philip I. Blumberg, "Corporate Responsibility and the Employee's Duty of Loyalty and Obedience: A Preliminary Inquiry," Oklahoma L.R., 24 (1971), 279-318; For an excellent history of the rule see: Jay Feinman, "The Development of the Employment At Will Rule," American Journal of Legal History, 20 (1976), 118-35.

[2] Adair v. United States, 208 U.S. 161 (1908).

[3] Coppage v. Kansas, 236 U.S. 1 (1915).

[4] 301 U.S. 1 (1937); In Phelps Dodge Corp. v. NLRB, 313 U.S. 177, 187 (1941), the Supreme Court confirmed that Adair v. United States and Coppage v. Kansas had outlived

their usefulness.

[5] Sec. 230 as amended by Ch. 161, L. 1978.

[6] Sec. 1, Ch. 621, L. 1978.

[7] K.R.S. Ch. 337 as created by Ch. 190, L. 1980.

[8] Sec. 750 (A-7) Ch. 102, L. 1966 as amended by Ch. 823, L. 1982.

[9] P.A. 186, L. 1981.

[10] Ch. 38 new par. 155-3 sec. 8 as added by P.A. 81-808, L. 1979.

[11] Sec. 98.6 as added by Ch. 1250, L. 1978.

[12] Sec. 215 as added by Ch. 281, L. 1967.

[13] Sec. 44-615 as amended by H.B. 3272, L. 1976.

[14] R.S. 23:964.

[15] Sec. 6 as amended by Ch. 1250, L. 1978.

[16] Cal. Government Code Sec. 9414.

[17] Sec. 3(1), Ch. 1, L. 1980.

[18] Sec. 1(b), P.A. 82-289, L. 1982.

[19] Secs. 653.250, 653.990.

[20] Title 43, Sec. 331n, Purdon's Penna. Statutues Annotated.

[21] Sec. 34-22-12.

[22] Sec. 177.14.

[23] Sec. 49.12.130.

[24] Sec. 104.10.

[25] Sec. 609.100.

[26] Sec. 653.250.

[27] 29 USCA § 215(a)(3).

[28] 29 USCA § 1140.

[29] 33 USCA § 948a.

[30] 42 USCA § 2000e-3(a).

[31] Sec. 132a, as added by Ch. 874, L. 1972

[32] 29 USCA § 660(c)(1).

[33] 29 USCA § 660(c)(2).

[34] 30 USCA § 820(b)(1).

[35] 45 USCA § 60.

[36] 45 USCA § 441(a).

[37] 46 USCA § 653.

[38] 46 USCA § 662.

[39] 46 USCA § 663.

[40] 46 USCA § 685.

[41] 46 USCA § 1506.

[42] 49 USCA § 2305.

[43] Sec. 1074.1A, as enacted by Act 280, L. 1981.

[44] 15 USCA § 2622.

[45] 33 USCA § 1367.

[46] 42 USCA § 300j-9.

[47] 42 USCA § 7622.

[48] 30 USCA § 1293.

[49] Sec. 1101-1105.

[50] Sec. 8-2-108(1).

[51] R.S. 23:961,962.

[52] Sec. 15.02(7) as recodified by H.B. 101, L. 1977.

[53] Sec. 32-2023.

[54] Sec. 1, Sec. 613.040-613.070.

[55] Sec. 1-8-16; Sec. 1-8-17.

[56] Sec. 3599.05.

[57] Sec. 16-17-560.

[58] Title 29, Sec. 136.

[59] Ch. 400, L. 1980.

[60] Sec. 212a as amended by S.B. 528, L. 1981.

[61] Sec. 13-1010.

[62] P.A. 397, L.1978.

[63] Sec. 8-2-108(1).

[64] R.S. 23:961,962.

[65] Sec. 15.020(7) as recodified by H.B. 101, L. 1977.

[66] Sec. 1, Sec. 613.040-613.070.

[67] Sec. 1-8-16; 1-8-17.

[68] Sec. 22-26-116; 22-26-117.

[69] Title 40, Ch. 5, Sec. 185-187.

[70] Sec. 2-3a, 31-511 as amended by H.B. 7802, L. 1971.

[71] I.C. 2-3-3-2 as amended by S.B. 180, L. 1982.

[72] Sec. 1, Sec. 613.040-613.070.

[73] Sec. 171.120; 171.122; 171.125.

[74] Sec. 210A-09 as amended by Ch. 406, L. 1980.